



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

June 20, 1991

Mr. Burton Raiford
Commissioner
Texas Department of Human Services
P. O. Box 2960
Austin, Texas 78769

OR91-301

Dear Mr. Raiford:

The Department of Human Services received two written requests for information under the Texas Open Records Act, article 6252-17a, V.T.C.S. The first request was for information compiled during an investigation conducted by the child protective services unit of the El Paso office of the Department of Human Services. This information included the "intake report" on the cases of two named children, the caseworker's evaluation, summary, and recommendations, and the department's disposition, if any, of those recommendations. The first request also asks for the "caseworker's supervisor's action and/or decision" in the case of one of the children. The second request was for the personnel file of an employee of the unit. The department requested the decision of this office pursuant to section 7 of the Open Records Act. The request was assigned ID# 5348.

As an initial matter, we must consider the department's admission that its request for this decision was not submitted to this office within ten calendar days as required by section 7(a) of the Open Records Act. That provision states that in the event the governmental body fails to request a decision within the designated time, the "information shall be presumed to be public information." This presumption may only be overcome by making a compelling demonstration of reasons why the information should not be released. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). The compelling interest required to overcome this presumption is reduced, however, when third party interests are at issue. See Open Records Decision No. 552 (1990). Furthermore, information that is deemed confidential by law under section 3(a)(1) of the act is not subject to this presumption.

The department explains that its failure to file a timely request was due to delays caused by the Christmas and New Year's holidays. These are not, in our opinion, compelling reasons, particularly in light of the unambiguous language of section 7(a) requiring the governmental body to submit its request for our decision "no later than ten *calendar* days" after receiving a written request for information.

The department furthermore has claimed only sections 3(a)(1) and 3(a)(11) as exceptions to disclosure. Since the department was unable to demonstrate compelling reasons to withhold the information under section 3(a)(11), it has waived that exception. Consequently, we will only examine the requested information in light of section 3(a)(1), as it is not subject to waiver.

The department submitted for our inspection four files containing documents the department considers responsive to the requests for information. The first file is entitled the "Child Protective Services Legal Record" compiled by the department in a case of alleged child abuse resulting in the death of a child. These records, we presume, comprise the written report of the department's investigation that must be submitted to the juvenile court or district court in accordance with section 34.05(e) of the Family Code. The department claims the contents of "File 1" are excepted in their entirety by section 3(a)(1) of the Open Records Act in conjunction with section 34.08 of the Family Code. We agree.

Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Section 34.08 of the Family Code provides the following:

Except as provided by subsections (b) and (c) of this section, the reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency.

Subsections (b) and (c) relate to the disclosure of records relating to an investigation of an adopted child to the adoptive parents, prospective adoptive parents, or to the child upon reaching adulthood. The requestor does not claim an entitlement to access under these provisions.

Since the materials contained in "File 1" were developed as part of a chapter 34 investigation, and because we are aware of no regulation of the department that

would authorize disclosure of the findings of the investigation, the department may withhold this information. *See* Open Records Decision No. 440 (1986) (copy enclosed). *See also* 40 T.A.C. §§ 85.7001 - 85.7007 (disclosure of abuse/neglect investigations in child care facilities).

"File 2" consists of information gathered during an internal investigation of the child protective services unit of the El Paso office. The department contends that the information in the file is protected by section 3(a)(1), which protects the constitutional and common law privacy rights of the individuals named in the file, and by section 34.08 of the Family Code. The department argues that the information compiled during the internal investigation would be protected by section 34.08 if it were included in the child protective services file for the particular case leading to the investigation.

We do not believe "File 2" may be excepted in its entirety pursuant to section 34.08 as "reports, records, and working papers used or developed" in the course of a chapter 34 investigation. The file contains two categories of documents: (1) duplicates of records prepared for use in a chapter 34 investigation and (2) documents prepared solely for internal purposes unrelated to the chapter 34 investigation that were not included in the department's written report to the district court under section 34.05(e).

The first category of documents may be withheld pursuant to section 34.08. The second category of documents in "File 2" may not be withheld pursuant to section 34.08. *See* Open Records Decision No. 587 (1991). The identities of clients of the child protective services unit appearing elsewhere in the file may be withheld in accordance with Open Records Decision No. 73 (1975), which found that similar information in the protective services records of the department pertaining to complaints of child abuse and neglect were protected by the constitutional right to privacy regarding family matters. The decision observed that an investigation of alleged child abuse constitutes a significant, but compelling, intrusion into the realm of family privacy and that the relationship between required public disclosure and the interests of the child was tenuous at best. We believe similar considerations apply to records in the custody of the department which do not directly relate to chapter 34 investigations but which nevertheless identify clients of the child protective services unit in the context of a child abuse investigation. The second file also contains several statements of employees of the department. These statements may not be withheld from public disclosure, but the names of clients and the home addresses and telephone numbers of employees who have elected not to allow

public disclosure of this information pursuant to section 3A of the Open Records Act may be deleted. We have marked the documents that may be withheld in whole or in part.

"File 3" is the personnel file of the individual named by the requestor. The department claims some of the information in the file is excepted by sections 3(a)(1) and 3(a)(11) of the Open Records Act. Section 3(a)(1) is claimed with respect to the names of clients of the child protective services unit that appear in some of the documents contained in the personnel file. This information may be withheld in accordance with Open Records Decision No. 73 (1975). We have marked representative samples of the personnel records accordingly. As noted earlier, we will not consider the applicability of section 3(a)(11) to the requested information.

The department also claims that a copy of the individual's federal "Employee's Withholding Allowance Certificate," known as Form W-4, may be withheld in accordance with Open Records Decision No. 226 (1979). That decision, however, held only that information appearing on a Form W-2 concerning the amount of federal income tax withheld, FICA taxes withheld, and total FICA wages was excepted pursuant to section 3(a)(1) in conjunction with 26 U.S.C. sections 6103 and 7213, which prohibit and penalize the disclosure of tax return information by federal or state officers or employees, among others. "Return information" is defined by federal law to mean, in pertinent part,

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, *or any other data*, received by, recorded by, prepared by, furnished to, or *collected by* the Secretary with respect to a return or *with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense* (Emphasis added.)

26 U.S.C. § 6103(b)(2)(A). The term has been interpreted broadly by the courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under Title 26. *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984).

The information in a Form W-4 is clearly data collected by the I.R.S regarding a taxpayer's liability and therefore comes within the broad prohibition of section 6103 of the Internal Revenue Code. The department may therefore withhold the form in its entirety.

"File 4" contains information relating to the department's most recent actions involving the employee named by the requestor. The department claims that the information is excepted by sections 3(a)(1) -- apparently in connection with section 34.08 of the Family Code -- and 3(a)(11). We have carefully reviewed the documents and conclude that a number of them prepared for use in a chapter 34 investigation may be withheld pursuant section 3(a)(1). Those documents have been marked accordingly.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-301.

Yours very truly,



Steve Aragon
Assistant Attorney General
Opinion Committee

SA/mc

Ref.: ID# 5348, 5613

cc: Ms. Berta Rodriguez
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